

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2019 - 34861 CA-01

CIVIL DIVISION

(30)

DR. JAMES ERIC MCDONOUGH,
Plaintiff,

vs.

ELIZABETH SEWELL, individually,
and/or in her capacity as City Clerk; and
CITY OF HOMESTEAD,
a Florida municipal corporation,
Defendants,

**VERIFIED PETITION FOR WRIT OF MANDAMUS FOR PRODUCTION OF PUBLIC
RECORDS AND REQUEST FOR DECLARATORY AND/OR INJUNCTIVE RELIEF**

1. This is an action seeking: 1) a writ of mandamus to compel the disclosure and release of nonexempt records improperly withheld from Petitioner by Defendants Elizabeth Sewell and City of Homestead in violation of the Florida Public Records Act, FS. 119 et seq.; 2) declaratory relief; 3) injunctive relief; 4) the removal and suspension or impeachment of Elizabeth Sewell, under FS. 119.10(1)(b); and 5) reasonable costs of enforcement of the instant action under FS. 119.12(1).

THE PARTIES, JURISDICTION, AND VENUE

2. Petitioner, Dr. James Eric McDonough (hereafter "McDonough"), is a resident of Miami-Dade County, Florida.

3. Defendant, Elizabeth Sewell (hereafter "Sewell"), is a resident of Miami-Dade County, Florida. Sewell is the City Clerk for the City of Homestead. Sewell has knowingly failed to produce all non-exempt public records requested by McDonough.

THE ORIGINAL FILED
IN THE OFFICE OF THE CLERK
NOV 27 2019
CIRCUIT & COUNTY COURTS
MIAMI-DADE COUNTY, FLORIDA

4. Defendant, City of Homestead (hereafter “CITY”), is a Florida municipal corporation located in Miami-Dade County, Florida. CITY possesses the public records sought by McDonough.

5. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to Article I, Sec. 24 of the Florida Constitution and Florida Public Records Act, FS. 119 et seq. This Court has jurisdiction to issue a writ of mandamus under Article V, sec. 5(b) of the Florida Constitution. This Court has jurisdiction to provide declaratory relief under FS. 86 et seq. This Court has jurisdiction to provide injunctive relief under Fla. R. Civ. P. 1.610. This Court has jurisdiction to remove and suspend or impeach Sewell under FS. 119.10(1)(b). This Court has jurisdiction to award McDonough his reasonable cost of enforcement under FS. 119.12(1).

6. Venue is appropriate since McDonough and Sewell are residents of Miami-Dade County, and CITY is located in Miami-Dade County.

CONDITIONS PRECEDENT

7. McDonough has complied with all conditions precedent to the bringing of this action.

PROCEDURAL HISTORY

I. REQUEST A (Original Denial of Public Records).

8. On October 12, 2015, McDonough filed a request for records (REQUEST A) for documentation related to the CITY defending police officer Alejandro Murguido (hereafter “Murguido”) in McDonough’s defamation case, Case No. 15-08342 CA 08.

9. REQUEST A stated in part:

I hereby file a records request for all documentation and financial records related to the City's decision to use the law firm of Weiss, Serota, Helfman, Cole and Bierman to defend officer Alejandro Murguido in Miami-Dade County case no. 15-08342 CA 08.

10. On November 19, 2015, CITY responded claiming all responsive records were exempt from disclosure under FS. 119.071(1)(d)(1) and FS. 90.502. See **Exhibit A**.

11. REQUEST A was litigated in Case No. 16-012412 CA 01, and Appeal No. 3D16-2462.

12. CITY alleged only five (5) records are responsive to REQUEST A. See **Exhibit B**.

13. CITY's argument, made after a lawsuit was filed, was upheld. That being that the Notice of Claim filed for the federal civil rights case, Case No. 16-cv-24542, was so inextricably intertwined with the defamation case for which the records request was filed, that CITY could withhold records under the attorney work product (FS. 119.071(1)(d)(1)), risk management files (FS. 768.28(16)(b)), and/or insurance claim files (FS. 624.311(2)) exemptions.

14. CITY has subsequently used this decision, *City of Homestead v. McDonough*, 232 So. 3d 1069 (3rd DCA Fla. 2017), to withhold responsive records related to the defamation case.

15. The said exemption(s) were designed to last only until the conclusion of all litigation related to the Notice of Claim, i.e. claims for which the CITY possessed liability.

16. Litigation on all claims related to the Notice of Claim, including any related appeal or fee issues, was concluded with prejudice on August 8, 2019.

17. CITY records show that during the acts complained of in the defamation case, which are separate from the acts complained of in the Notice of Claim by date and location, Murguido was acting as a private citizen, not as a CITY police officer. See **Exhibit C**.

18. CITY has no liability in the defamation case, and as such has no right to a claim of privilege under attorney work-product, risk management, or insurance claims file exemptions.

19. Lastly, the trial and appellate attorneys representing CITY during litigation of REQUEST A had email communications discussing the unlawful refusal to produce responsive non-exempt records therein, at least in not providing McDonough the responsive financial records,

and discussing how they had instead deliberately misled and/or were planning to mislead both the trial and appellate courts on this issue. See **Exhibit D**.¹

II. REQUEST B (Public Records Refused to Plaintiff but Provided to Another).

20. On July 20, 2016, Jason Jensen (hereafter “Jensen”) filed a records request to CITY (REQUEST B). This records request contained the verbatim language of McDonough’s REQUEST A from ¶ 9 above. See **Exhibit E**.

21. On July 25, 2016, CITY provided Jensen with an invoice (INVOICE B) which also contained the verbatim language from ¶ 9 above. See **Exhibit F**.

22. CITY subsequently produced several one hundred twenty-two (122) pages of responsive non-exempt public records to Jensen.

23. CITY admitted on the record, at the July 31, 2017 hearing, in related Case No. 17-017515 CA 01, that there were approximately five hundred (500) responsive records, but due to exemptions only the one hundred twenty-two (122) pages mentioned above in ¶ 22 were produced.

III. REQUEST 2 (Related to but Subset of Records REQUEST A).

24. The related case, Case No. 17-017515 CA 01, includes a similar records request denoted as REQUEST 2 both therein and herein, filed on June 15, 2016. See **Exhibit G**.

25. No records responsive to REQUEST A or REQUEST 2 were ever produced to McDonough in response to those requests.

26. In comparison, records responsive to REQUEST B filed by Jensen, which were verbatim to REQUEST A filed by McDonough, were produced to Jensen.

GENERAL ALLEGATIONS

I. REQUEST 1 (The Request at Bar).

¹ There was no way for McDonough to discover the existence and extent of the CITY’s misconduct until after all litigation related to REQUEST A was finally closed.

27. On November 12, 2019, McDonough emailed Sewell, the custodian of records, submitting the sole records request at bar (REQUEST 1) for all records which would have been responsive to REQUEST A, when CITY responded to REQUEST A on November 19, 2015.

28. On November 13, 2019, Sewell acknowledged the request. See **Exhibit H**.

29. On November 19, 2019, Sewell responded to REQUEST 1, and as had been done in REQUEST A alleged only five (5) responsive documents exist.

30. Sewell provided an email chain containing four (4) of the five (5) allegedly responsive documents. Yet, the fourth email included in the chain was redacted. See **Exhibit I**.

31. Sewell in her response provided a letter attempting to explain the redaction and proffering a specious interpretation for why the fifth document had not been provided, though this fifth document was not alleged to remain exempt and it was explicitly requested. See **Exhibit J**.

32. Whereas, Sewell failed to produce to McDonough any of the one hundred twenty-two (122) pages of responsive and non-exempt records which were earlier provided to Jensen.

33. Furthermore, Sewell failed provide any of the remaining documents making up the remaining approximately five hundred (500) documents alleged to be responsive or claim that any of these documents are privileged from disclosure.

34. Based up on ¶¶ 32-33 above and ¶¶ 35-37 below, any allegation that only five (5) records responsive to REQUEST 1 exist, is patently false.

35. Included in the one hundred twenty-two (122) pages of records produced to Jensen responsive to REQUEST B, but not provided to McDonough in REQUEST A or REQUEST 1 though all request were identical, was: i) more than a dozen emails about a conference call related to defending Murguido (**Exhibit K**); ii) the defamation complaint, i.e. legal filing (**Exhibit L**); iii) an email from S. Kosto to Eric Stettin (hereafter “Stettin”) on July 8, 2015 containing the retainer agreement, which was not produced (**Exhibit M**); iv) an email chain between Stettin and Sam

Zeskind (**Exhibit N**); v) an email chain between Stettin and Sewell (**Exhibit O**); vi) an email chain on behalf of the Chief of Police requesting CITY to defend Murguido, i.e. documentation related to the decision (**Exhibit P**); and vii) pertinent billing invoices, i.e. financial records related to the decision (**Exhibit Q**).

36. The records described in ¶ 35 are non-exempt and are responsive to REQUEST 1.

37. Other responsive non-exempt legal filings in the defamation case were also unlawfully withheld in response to REQUEST 1, REQUEST A, and REQUEST B.

38. Subsequently, on November 19, 2019, McDonough responded to Sewell, and advised her that all responsive and non-exempt documents had not been provided and demanded the remaining responsive records be produced by Friday, November 22, 2019. See **Exhibit R**.

39. No additional non-exempt responsive records have been provided.

II. REQUEST C (Showing Pattern of Unlawful Refusal to Produce Records).

40. On February 18, 2019, McDonough filed a request for public records (REQUEST C) with CITY requesting all records related to Murguido's use of leave time.

41. On March 8, 2019, the related records case, Case No. 19-06869 CA 01, was filed.

42. On March 11, 2019, after the suit was filed, CITY provided the First Set of responsive records.

43. Subsequently, CITY through its attorney, Matthew Mandel (hereafter "Mandel"), asserted that all responsive records were produced and as such the case was moot. See **Exhibit S**.

44. On March 15, 2019, after McDonough sent an email, Sewell provided a Second Set of documents, claiming the "remaining responsive records" were therein provided. See **Exhibit T**.

45. However, Sewell went on to provide a Third Set, a Fourth Set, and a Fifth Set of responsive records. See **Exhibit U**, **Exhibit V**, and **Exhibit W** respectively.

46. As more sets of records continued to be produced, Mandel and Sewell's respective assertion and claim that all responsive records had been provided were patently false.

47. In total, CITY, through Sewell, provided five (5) sets of documents all at different times, all responsive to REQUEST C, and all after the filing of the lawsuit therein.²

STATUTORY REQUIREMENTS AND CONDITIONS MET

48. FS. 119.07(1)(a) holds:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

49. FS. 119.10(1)(b) holds in part:

- (1) Any public officer who:
- (b) Knowingly violates the provisions of s. 119.07(1) is subject to suspension and removal or impeachment...

50. FS. 119.11(1) holds:

Whenever an action is filed to enforce the provisions of this chapter, the court shall set an immediate hearing, giving the case priority over other pending cases.

51. FS. 119.12(1) holds:

(1) If a civil action is filed against an agency to enforce the provisions of this chapter, the court shall assess and award the reasonable costs of enforcement, including reasonable attorney fees, against the responsible agency if the court determines that:

(a) The agency unlawfully refused to permit a public record to be inspected or copied; and

(b) The complainant provided written notice identifying the public record request to the agency's custodian of public records at least 5 business days before filing the civil action, except as provided under subsection (2). The notice period begins on the day the written notice of the request is received by the custodian of public records, excluding Saturday, Sunday, and legal holidays, and runs until 5 business days have elapsed.

² It is noted that CITY alleges only four of the distinct sets of documents were responsive to REQUEST C. Whereas, McDonough contends that the fifth set of documents was responsive, and McDonough contends that all non-exempt records responsive to REQUEST C have still NOT been provided therein.

Further, it is noted that related Case No. 19-06869 CA 01 is at the Third District Court of Appeals, Appeal No. 3D19-1362, where CITY has filed its response brief and explicitly did not contest the relief McDonough sought therein.

52. REQUEST 1 was submitted in writing to the CITY Clerk at the address provided more than five (5) business days prior to the filing of this action, and McDonough is entitled an immediate hearing and to his reasonable costs of enforcement due to CITY's unlawful refusal to produce to McDonough all non-exempt and responsive public records requested.

REQUEST FOR RELIEF

53. CITY is an agency as defined in FS. 119.011(2).

54. McDonough made a valid request in writing, to CITY's custodian of records, Sewell, more than five (5) business days before the filing of the instant enforcement action.

55. CITY and Sewell have a clear non-discretionary and statutory duty under FS. 119.07(1)(a) to permit inspection and copying of public records.

56. McDonough has a clear legal and constitutional right to inspect and receive copies of all non-exempt public records under Article I, Sec. 24 of the Florida Constitution and the Florida Public Records Act, FS. 119 et seq.

57. The records requested by McDonough are not privileged from disclosure.

58. McDonough has no other adequate remedy at law.

59. CITY, through Sewell, has failed to provide all responsive and non-exempt records creating an unlawful refusal to produce public records herein in at least the following five (5) ways.

60. First, of the five (5) records Sewell alleges to be responsive to REQUEST 1, the First Record for which a claim of privilege is made under the insurance claims file exemption was unlawfully withheld. While the insurance claims file itself may be exempt, records which exist outside of said file are not exempt solely by virtue of being present within the claims file. The record for which privilege is made is attached to an email chain which is clearly outside of the claims file and which was produced to McDonough showing it was not privileged. Alternatively, CITY has no right to a claim of privilege as it has no liability.

61. Second, of five (5) records Sewell alleges to be responsive, the Fifth Record was unlawfully withheld. Sewell admits the record would be responsive, but fails to list an exemption to justify its withholding. *Woodard v. State*, 885 So. 2d 444, 446 (Fla. 4th DCA 2004) (records custodian must furnish copies of records when the person requesting them identifies the portions of the record with sufficient specificity to permit the custodian to identify the record and forwards the statutory fee). There was sufficient specificity given for the Sewell to identify the record, and no fee. Further, Sewell has no discretion to arbitrarily interpret McDonough's request contrary to the plain language within the request, and has a duty to contact McDonough if in doubt.

62. Third, Sewell failed to produce any of the one hundred twenty-two (122) pages produced to Jensen in identical REQUEST B. These responsive records are not privileged.

63. Fourth, Sewell failed to produce any of the other five hundred (500) documents of the second set of records it alleged were responsive to Jensen's REQUEST B, nor has CITY asserted any privilege for any of said documents.

64. Fifth, Sewell failed to produce other legal filings from the defamation case, such as the civil cover sheet, Notice of Appearance, and Motion(s) to Dismiss. None of these filings are privileged, they are responsive, and they should have been produced in REQUESTS 1, A and B.

65. Sewell has failed to assert any claim of privilege for said responsive records described in ¶¶ 62-64 above. Therefore, these public records were unlawfully withheld.

66. The actions of the CITY through its Clerk, Elizabeth Sewell, were knowingly and willfully unlawful, whereas civil penalties which include removal and suspension or impeachment are sought and available as remedies under FS. 119.10(1)(b).

67. McDonough seeks and is entitled to an order to show cause or alternatively a writ of mandamus directed to CITY and/or Sewell requiring: a) production of all non-exempt responsive records; and/or b) lawful justification for continued withholding of said records.

68. McDonough seeks and is entitled to declaratory relief. There exists an actual bonafide dispute pertaining his legal right(s) to all non-exempt public records responsive to REQUEST 1. Thus, a justiciable controversy exists the relief sought rises above satisfying a mere curiosity and is not: speculative in nature; seeking legal advice; or a mere advisory opinion.

69. McDonough seeks and is entitled to relief enjoining CITY from future unlawful refusals to produce non-exempt responsive records as: 1) irreparable harm will result if the injunction is not entered, as CITY will continue to refuse to provide non-exempt records; 2) McDonough has no other adequate remedy at law; 3) there is substantial likelihood of success on the merits, and *prima facie* evidence of repeated violations are presented herein; and 4) entry of the injunction will serve the public interest in fulfilling the Government in the Sunshine provisions of the Florida Constitution. The request is not for a blanket order to enjoin the CITY for any violation, but only for violations which bear resemblance to the violations complained of herein and in Case No. 19-06869 CA 01. Further, CITY has demonstrated a pattern of non-compliance in the repeated affirmative and unlawful refusals to provide non-exempt responsive records, and there is a well-grounded probability of similar future conduct occurring if CITY is not enjoined.

70. McDonough seeks and is entitled to an immediate hearing under FS. 119.11(1).


71. McDonough seeks and is entitled to an in-camera inspection of all records claimed to be privileged from disclosure under FS. 119.07(1)(g).

72. McDonough seeks and is entitled to recover his reasonable costs of enforcement from CITY under FS. 119.12(1)(a) and has met the requirements thereof under FS. 119.12(1)(b).

WHEREFORE, McDonough respectfully requests this Honorable Court to set an accelerated hearing to resolve these matters. McDonough also respectfully request this Honorable Court to enter an Order granting the requested Writ of Mandamus; declaring CITY's affirmative refusal to provide records unlawful; enjoining CITY from future unlawful refusals by refusing to

provide all responsive non-exempt records when requested; removing and suspending or impeaching Elizabeth Sewell as CITY Clerk; awarding McDonough his reasonable costs of enforcement; and awarding any such other relief as is just and proper under the circumstances.

Respectfully submitted,


Dr. James Eric McDonough, *pro se*
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VERIFICATION

As Affiant, I, Dr. James Eric McDonough, hereby declare under penalty of perjury that the above facts are true and correct to the best of my knowledge and ability. Further, Affiant sayeth not.

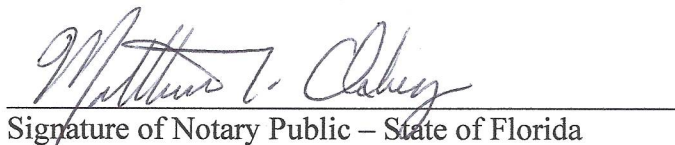

DR. JAMES ERIC MCDONOUGH, Affiant


STATE OF FLORIDA


COUNTY OF MIAMI-DADE

Sworn to and subscribed before me this 27th day of November 2019 by

Dr. James Eric McDonough


Signature of Notary Public – State of Florida


Name of Notary, Typed, Printed or Stamped

☒ Known  OR Produced Identification _____

Type of Identification Produced _____

